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No. 85-5024

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

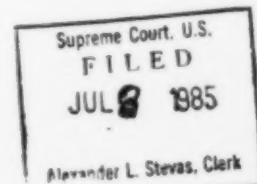
MICHAEL KENT POLAND, Petitioner,
vs.
THE STATE OF ARIZONA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA

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QUESTION PRESENTED FOR REVIEW

Does the double jeopardy clause of the fifth amendment to the United States Constitution prevent the State of Arizona from reimposing the death penalty following retrial, when on appeal from the first trial, the Supreme Court of Arizona struck the only aggravating circumstance to support the death penalty because of insufficient evidence?

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IN THE
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October Term 1984

MICHAEL KENT POLAND, Petitioner,
vs.
THE STATE OF ARIZONA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
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OPINION BELOW

A copy of the opinion of the Supreme Court of Arizona in the petitioner's case is attached as Appendix I and a copy of the opinion entered in the case of State of Arizona v. Patrick Poland, which is incorporated by reference in petitioner's opinion is attached as Appendix II. The opinion of the Arizona Supreme Court affirming petitioner's conviction may be found at 698 P.2d 207 (1985), which incorporates by reference the opinion affirming the petitioner's brothers' conviction, which may be found in 698 P.2d 183 (1985). A copy of the order of the Supreme Court of Arizona denying reconsideration rehearing is attached as Appendix III.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on March 20, 1985, a timely motion for rehearing was denied on May 7, 1985. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

1 CONSTITUTIONAL PROVISIONS INVOLVED

2 The fifth amendment to the United States Constitution

3 states:

4 "No person shall be held to answer
5 for a capital, or otherwise infamous
6 crime, unless on a presentment or in-
7 dictment of a Grand Jury, except in
8 cases arising in the land or naval
9 forces, or in the Militia, when in
10 actual service in time of War or
11 public danger; nor shall any person
12 be subject for the same offence to
13 be twice put in jeopardy of life or
14 limb; nor shall be compelled in any
15 criminal case to be a witness against
16 himself, nor be deprived of life,
17 liberty or property, without due
18 process of law; nor shall private
19 property be taken for public use,
20 without just compensation."

21 STATEMENT OF THE CASE

22 The petitioner and his brother, PATRICK GENE POLAND,
23 were jointly tried and found guilty of first degree murder. The
24 law in effect at the time, A.R.S. 13-453, punishment for murder
25 provides:

26 "A. A person guilty of murder in
27 the first degree shall suffer death or
28 imprisonment in the State Prison for
29 life, without possibility of parole
30 until completion of the service of
31 twenty-five (25) calendar years in
32 the State prison as determined by and
33 in accordance with the procedure pro-
34 vided in §13-454."

35 A.R.S. 13-454, a copy of which is set forth in Appendix
36 IV. provides for a separate hearing before the judge for the pur-
37 pose of determining whether to impose a death penalty or a life
38 sentence without possibility of parole. In determining whether to
39 impose a sentence of death or life imprisonment, the court shall
40 take into account statutory aggravating circumstances as en-
41 numerated in subsection E. In accord with State v. Watson, 586

1 P.2nd 1253 (1978), the petitioner was entitled to present any evi-
2 dence in mitigation at the time of sentencing. The State filed its
3 memorandum seeking the death penalty based upon 13-454(E)(5), the
4 defendant committed the offense as consideration for receipt, or in
5 expectation of the receipt of anything of pecuniary value and 13-
6 454(E)(6), the defendant committed the offense in an especially
7 heinous, cruel or depraved manner. (Appendix V)
8

9 The court by its special verdict, dated April 9, 1980,
10 (Appendix VI) found none of the aggravating circumstances present
11 except that the offense was committed in an especially heinous,
12 cruel or depraved manner. With regard to mitigating circumstances,
13 the court found none of the statutory mitigating circumstances pre-
14 sent. The court did find the petitioner's previous reputation for
15 good character as a mitigating circumstance and that the close
16 family ties that existed between the petitioners and their family
17 and their children as mitigating circumstance. (Appendix VI) The
18 court in imposing the death penalty found that one aggravating cir-
19 cumstance exists and there are no mitigating circumstances suffi-
20 cient to call for leniency. (Appendix VII)
21

22 On joint appeal the petitioner raised issues relating
23 to the guilt phase of the trial and in addition raised the issue as
24 to the finding of the especially heinous, cruel and depraved. The
25 State of Arizona did not cross appeal. The opinion of the State v.
26 Poland is reported in 645 P.2nd 801 (1981), a copy of the opinion
27 is attached as Appendix VIII. The Supreme Court of the State of
28 Arizona reversed the petitioner's conviction on the guilt phase of
29 the trial because of preceudral error. The court went on to find:
30
31

32 "We do not believe it has been shown

1 beyond a reasonable doubt that the
2 murders were committed in an "especially
3 heinous, cruel or depraved manner."
(Appendix VIII, page 28)

4 The Arizona Supreme Court further stated:

5 "It was not until after the trial in
6 this case that we held, in State v.
7 Clark, supra, that A.R.S. §13-454(E)
8 (5), was not limited to "murder for
9 hire" situations, but may be found
10 where any expectation of financial
11 gain was a cause for the murder.
Upon retrial, if the defendants are
again convicted of first degree mur-
der, the court may find the exist-
ance of this aggravating circumstance."
(Appendix VIII, pages 28 and 29)

12 Upon retrial the petitioner and his brother, PATRICK
13 GENE POLAND, were again found guilty of first degree murder during
14 the guilt phase of trial. The prosecution filed a notice of intent
15 to seek the death sentence based upon Arizona Revised Statutes
16 §13-454(E) (5), the defendant committed the offence as consideration
17 for the receipt or in the expectation of the receipt of anything of
18 pecuniary value and Arizona Revised Statutes §13-453(E) (6), the de-
19 fendant committed the offence in an especially heinous, cruel or
20 depraved manner. (Appendix IX)

21 The petitioner's response to the sentencing memorandum
22 took the position that the prosecution is barred from seeking the
23 death penalty by the holding of the United States Supreme Court in
24 Bullington v. Missouri, 451 U.S. 430 (1981). (Appendix X, page 1)
25 The trial court by its special written verdict, dated February 3,
26 1983, found two aggravating circumstances. That the murders were
27 intentionally and premeditatedly committed solely for financial
28 motive and the murders were especially heinous, cruel and depraved.
29 This time the court found the petitioner's previous reputation for
30
31
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1 good character is not a mitigating circumstance for the reputations
2 were false. (Appendix XI) The petitioner was again sentenced to
3 death on February 3, 1983. (Appendix XII)

4 Upon appeal the petitioner's conviction on the guilt
5 phase of the trial was affirmed by a unanimous court. The sentenc-
6 ing portion of the trial was affirmed by majority of three members
7 of the Supreme Court of Arizona, with two members thereof dissent-
8 ing. Petitioner filed a timely motion for reconsideration which
9 was denied by a majority of three members of the Supreme Court of
10 Arizona.
11

12 ARGUMENT

13
14 THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRE-
15 VENTS THE STATE OF ARIZONA FROM IMPOSING THE DEATH PENALTY ON THE
16 PETITIONER FOLLOWING RETRIAL.

17 Arizona law A.R.S. §13-453, provides for two possible
18 sentences for a defendant that committed a capital murder:

19 "A person guilty of murder in the
20 first degree shall suffer death or
21 imprisonment in the state prison
22 for life, without possibility of
23 parole until the completion of the
24 service of twenty-five calendar
25 years in the state prison as deter-
26 mined by and in accordance with the
27 procedure followed in 13-454."

28 In order for the trial court to impose the death penalty
29 it must find beyond a reasonable doubt, (State v. Jordon, 614 P.2d
30 825, cert. denied 449 U.S. 986 (1980)), that at least one aggravat-
31 ing circumstance enumerated in subsection A.R.S. §13-454(E)
32 exists and that there are no mitigating circumstances sufficient to
call for leniency. (A.R.S. §13-454(D) See Appendix IV)

Following first sentencing trial the court found one

1 aggravating circumstance. A.R.S. §13-454(E)(6). (See Appendix IV)

2 "The defendant committed the
3 offense in an especially heinous,
4 cruel or depraved manner."
5 (Appendix VI, Special Verdict,
6 dated April 9, 1980.)

7 The court imposed the death penalty (Appendix VII,
8 Judgment and Sentence dated April 9, 1980). Upon appeal the Sup-
9 reme Court of Arizona found in regard to the aggravating circum-
10 stance:

11 "We do not believe it has been
12 shown beyond a reasonable doubt
13 that the murders were committed
14 in an "especially heinous, cruel
15 or depraved manner." (Appendix
16 VII, page 28, Opinion of the
17 Supreme Court dated April 13,
18 1982 or 645 P.2d 784, 800 (1982).

19 The three member majority on the second appeal explain-
20 ed its previous ruling as:

21 "Our holding in Poland I, however,
22 was simply that the death penalty
23 could not be based solely upon this
24 aggravating circumstance because
25 there was insufficient evidence to
26 support it." (Appendix II, Opinion
27 dated March 20, 1985, page 31 or
28 698 P.2d 183, 199 (1985).)

29 The petitioner posits that the Supreme Court of Arizona
30 by its opinion of the petitioner's first trial has through double
31 jeopardy acquitted him of the death penalty. In Bullington v.
32 Missouri, 451 U.S. 430 (1981), this court held that double jeopardy
principles apply to the sentencing phase of Missouri's bifurcated
death penalty system. Likewise, this court has previously held
that Arizona's death penalty sentencing procedure is a separate
trial invoking double jeopardy protection. Arizona v. Rumsey,
____ U.S. _____, 104 S.Ct. 2305, 81 L.Ed.2d 164, (1984).

The only distinguishing factor from Bullington v. Missouri is the

1 petitioner received a death penalty at both trials. Whereas,
2 Bullington received life following his first trial and death follow
3 ing his second trial. The distinguishing factor from Arizona v.
4 Rumsey, is petitioner was granted a new trial on the guilt phase,
5 but is identical on the sentencing trial in that the sole aggra-
6 vating circumstance exposing the petitioner to the death penalty
7 was struck by the trial court at his first trial, but was found
8 proven at his second trial. Since under Bullington v. Missouri,
9 supra, and Arizona v. Rumsey, supra, double jeopardy applies to the
10 sentencing phase of the bifurcated death penalty system, therefore,
11 a ruling by the Arizona Supreme Court on the first appeal finding
12 insufficient evidence, thereby precludes a second trial on the
13 death penalty issue, in that the double jeopardy clause precludes
14 a second trial once the reviewing court has found the evidence
15 legally insufficient. (Burks v. United States, 437 U.S. 1 (1978)).
16 Green v. Massey, 437 U.S. 19 (1978), (Applying Burks to the States).

17
18 The petitioner's position is not without authority with-
19 in the Federal circuit's courts. The fifth circuit has applied
20 this principle in preventing the State from seeking a second chance
21 to impose the death penalty. Jones v. Thigpen, 741 F.2d 805,
22 (5th cir. 1984), cert. pending. (Thigpen v. Jones, No. 84-1237,
23 filed January 14, 1985.) In Young v. Kemp, 760 F.2d 1097, (11th
24 cir. 1985), page 1101:

25
26
27 "We conclude that the previous
28 judgment of this court left in-
29 tact the districts court's find-
30 ing of insufficient evidence to
31 support the death penalty. That
32 being the case, the double jeopardy
principles announced in Burks v.
United States, 437 U.S. 1, 98 S.Ct.
2141, 57 L.Ed.2d 1 (1978), and

1 Bullington v. Missouri, 451 U.S.
2 430, 101 S.Ct. 1852, 68 L.Ed.2d
3 270 (1981), prevent the state
4 from seeking the death penalty
5 in Young's retrial."

6 The petitioner submits that under the posture of his
7 case and the law as it now exists, the State of Arizona may not im-
8 pose the death penalty upon petitioner following his second trial
9 because of double jeopardy.

10 CONCLUSION

11 The decision of the Arizona Supreme Court rejecting
12 petitioner's constitutional claim of double jeopardy is erroneous
13 and in conflict with decisions of this court. The question raised
14 is substantial as is the consequences of an erroneous judgment. To
15 prevent the forfeiture of the petitioner's life, along with his
16 federal constitutional rights, petitioner respectfully requests that
17 this court grant a writ of certiorari to review the judgment of the
18 Arizona Supreme Court and remand with direction that double
19 jeopardy prevents the imposition of the death penalty.

20 DATED this 5th day of July, 1985.

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